

**This Opinion is Not a
Precedent of the TTAB**

Mailed: February 11, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re RPD Management, LLC

Serial No. 87573250

Joseph P. Kincart and Trace H. Jackson of Rogers Towers PA for RPD
Management, LLC.

Michael Fitzsimons, Trademark Examining Attorney, Law Office 103,
Stacy Wahlberg, Managing Attorney.¹

Before Cataldo, Wellington and Hightower,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Applicant, RPD Management, LLC, dba Intuition Ale Works, seeks registration on the Principal Register of the mark displayed as Figure 1 below (“GENUINE,” “QUALITY,” “WEST COAST,” “IPA,” and “INDIA PALE ALE” disclaimed), identifying “beer” in International Class 32.²

¹ The involved application was reassigned to the above-listed Examining Attorney subsequent to issuance of the final Office Actions.

² Application Serial No. 87573250 was filed on April 17, 2017 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicant’s claim of November 21, 2010 as a date of use of the mark anywhere and in commerce.

Figure 1.



Applicant submitted the following description of the mark and color(s) claimed statement:

The mark consists of a green block shaped vintage wagon style car facing to the right, on the car there is a windshield, three passenger side windows and on the right side of the car where the doors would be are the words "I-10" in white covering the length of the car under the three side windows, along the front right fender of the car in white small cap font are the words "WEST COAST" with the words "Genuine" written vertically upwards behind the wheel and "Quality" written vertically upwards in front of the wheel well, across the hood of the car is the abbreviation "IPA" in all caps and the front of the grill of the car has "India pale ale" written in all lower case, above a grill with headlights.

The color(s) GREEN AND WHITE is/are claimed as a feature of the mark.

The Trademark Examining Attorney has refused registration of Applicant's mark:

(1) on the ground of likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), in view of Registration No. 5092193, issued on the Principal Register for the mark I-10 IPA (standard characters, "IPA" disclaimed), identifying "beer, ale, lager, stout and porter" in International Class 32;³ and (2) under Trademark Rule 2.37, 37 C.F.R. § 2.37, on the ground that Applicant must amend the description of the mark to specify the color of certain of the literal elements appearing therein.

³ Registration No. 5092193 issued on November 29, 2016.

The refusal to register under Section 2(d) has been fully briefed by Applicant and the Examining Attorney.

Based upon the record and the arguments made, we affirm the likelihood of confusion refusal and the mark description requirement.

I. Evidentiary Issue

Applicant included in its appeal brief a hyperlink to an online article that, according to Applicant, discusses the influence of tap handles on beer selection by purchasers in bars.⁴ Applicant did not introduce into the record during prosecution of its involved application any printouts from this article or website.

We have made clear that providing hyperlinks to internet materials is insufficient to make such materials of record. *See In re Olin*, 124 USPQ2d 1327, 1331 n.15 (TTAB 2017) (citing *In re Powermat Inc.*, 105 USPQ2d 1789, 1791 (TTAB 2013)); *In re HSB Solomon Assocs., LLC*, 102 USPQ2d 1269, 1274 (TTAB 2012) (stating that “a reference to a website’s internet address is not sufficient to make the content of that website or any pages from that website of record”); *Safer Inc. v. OMS Investments Inc.*, 94 USPQ2d 1031, 1039 (TTAB 2010) (noting that because of the transitory nature of internet postings, websites referenced only by links may later be modified or deleted). The procedure for making printouts of internet evidence of record is addressed in Trademark Manual of Examining Procedure (TMEP) § 710.01(b) (Oct. 2018) and the cases cited therein.

⁴ 4 TTABVUE 7.

As a result, the information assertedly available by following the hyperlink is not evidence in this appeal, nor will it be given any consideration.⁵

We turn now to the merits of this appeal.

II. Amendment to Description of the Mark

The Examining Attorney raised the requirement for an amended description of the mark in the November 20, 2017 first Office Action.⁶ Applicant submitted an amended description of the mark with its April 5, 2018 Response to the Examining Attorney's first Office Action.⁷ However, in the May 3, 2018 final Office Action, the Examining Attorney made final the requirement, stating as follows:⁸

The trademark examining attorney submits that the description of the mark is accurate but incomplete because it does not describe all the significant aspects of the applied-for mark. Applications for marks not in standard characters must include an accurate and concise description of the entire mark that identifies literal elements as well as any design elements. *See* 37 C.F.R. §2.37; TMEP §§808 *et seq.*

Therefore, applicant must provide a more complete description of the applied-for mark. The following is suggested:

The mark consists of a green block shaped vintage wagon style car facing to the right ***with features outlined in white***. On the car there is a windshield, three passenger side windows and on the right side of the car where the

⁵ The evidentiary record in an application should be complete prior to the filing of an appeal. Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d); Trademark Board Manual of Procedure (TBMP) §§ 1203.02(e), 1207.01 (2018); TMEP § 710.01(c) (Oct. 2018). The proper procedure for an applicant or examining attorney to introduce evidence after an appeal has been filed is to submit a written request with the Board to suspend the appeal and remand the application for further examination. *See* Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d). *See also* TBMP § 1207.02 and authorities cited therein.

⁶ At .pdf 7. Citations to the prosecution history are to the downloadable .pdf version of the Trademark Search and Data Retrieval (TSDR) database.

⁷ At .pdf 1.

⁸ At .pdf 5. Emphasis provided by the Examining Attorney.

doors would be are the words “I-10” in white covering the length of the car under the three side windows. Along the front right fender of the car in white small cap font are the words “WEST COAST” with the words “Genuine” *in white* written vertically upwards behind the wheel and “Quality” *in white* written vertically upwards in front of the wheel well. Across the hood of the car is the abbreviation “IPA” *in white and* in all caps and the front of the grill of the car has “India pale ale” written in all lower case *in white*, above a grill with headlights.

Applicant presents no arguments in its brief addressing the requirement for an amendment to the description of the mark.⁹ In her appeal brief, the Examining Attorney presents arguments regarding the requirement and notes that Applicant has not addressed the requirement in its brief. Applicant did not file a reply brief.

We find that Applicant has waived its appeal of the Examining Attorney’s requirement under Trademark Rule 2.37, 37 C.F.R. § 2.37. *In re Harley*, 119 USPQ2d 1755, 1758 (TTAB 2016) (Applicants’ failure to address any of the grounds for refusal is a basis for affirming the examining attorney’s refusal on all grounds); TBMP § 1203.02(g) (2018) (“If an applicant, in its appeal brief, does not assert an argument made during prosecution, it may be deemed waived by the Board.”).

Accordingly, the Examining Attorney’s requirement under Trademark Rule 2.37, 37 C.F.R. § 2.37 for an amended description of the mark, is affirmed.

III. Likelihood of Confusion

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In*

⁹ Neither did Applicant submit a request for reconsideration of the refusal of registration or requirement at issue herein.

re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976); *see also In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

A. Relatedness of the Goods and Channels of Trade

With regard to the goods, channels of trade and classes of consumers, we must make our determinations under these factors based on the goods as they are identified in the application and cited registration. *See In re Dixie Rests. Inc.*, 41 USPQ2d at 1534; *see also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Hous. Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). “This factor considers whether ‘the consuming public may perceive [the respective goods or services of the parties] as related enough to cause confusion about the source or origin of the goods and services.’” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1086 (Fed. Cir. 2014) (quoting *Hewlett-Packard*, 62 USPQ2d at 1004).

In this case, the identified “beer, ale, lager, stout and porter” in the cited registration encompasses and includes Applicant’s “beer.” Put another way, Applicant’s “beer” is subsumed under the broader list of “beer, ale, lager, stout and

porter” in the cited registration. Applicant’s goods thus are identical in part to the goods identified in the cited registration. As noted above, we determine the relatedness of the goods, as we must, based upon their respective identifications in the cited registration and involved application. *See, e.g., Stone Lion Capital Partners, LP v. Lion Capital LLP*, 110 USPQ2d at 1161. Neither Applicant nor Registrant recites any restrictions in their identified “beer” as to style, flavor or price point and, as discussed above, they are presumed to be legally identical. Applicant, while not expressly conceding this point, presents no argument in its brief that the goods differ or otherwise are not related.

Because the goods identified in the application and the cited registration are, in part, legally identical, we must presume that the channels of trade and classes of purchasers for these goods are the same. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003) (“Given the in-part identical and in-part related nature of the parties’ goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade”); *In re Smith & Mehoffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) (“Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers”); *see also Octocom Sys., Inc.*, 16 USPQ2d at 1787 (“The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what

the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.”).

We find that the *du Pont* factors regarding the in-part legal identity of the goods, channels of trade and consumers weigh heavily in favor of likelihood of confusion. It is clear that if these in-part identical goods are offered under similar marks there would be a likelihood of confusion. Thus, we turn to the marks, keeping in mind that when marks would appear on identical goods, as they do here, the degree of similarity between the marks necessary to support a finding of likely confusion declines. *See Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *In re Viterra Inc.*, 671 F.3d 1358, 1363, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012)); *Century 21 Real Estate v. Century Life*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

B. Similarity or Dissimilarity of the Marks



We consider Applicant's mark  and the registered mark I-10 IPA (in standard characters) and compare them “in their entirety as to appearance, sound, connotation and commercial impression.” *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 110 USPQ2d at 1160; *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). “The proper test is not a side-by-side

comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (internal quotation marks omitted); *see also Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1470 (TTAB 2016); *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016). Although we place the marks alongside each other for purposes of this decision, consumers may not necessarily encounter the marks in close proximity and must rely upon their recollections thereof over time. *In re Mucky Duck Mustard*, 6 USPQ2d 1467, 1468 (TTAB 1988).

Because the similarity or dissimilarity of the marks is determined based on the marks in their entireties, our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); *see also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). On the other hand, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *Nat’l Data*, 224 USPQ at 751.



Applicant's mark  consists of the entirety of the registered mark I-10 IPA in standard characters, with additional wording and a design. While there is no rule that likelihood of confusion automatically applies where one mark encompasses another, in this case, as in many others, the fact that the entire cited mark is incorporated in Applicant's mark increases the similarity between the two. *See, e.g., In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010) (applicant's mark ML is similar to registrant's mark ML MARK LEES); *In re U.S. Shoe Corp.*, 229 USPQ 707, 709 (TTAB 1985) (finding applicant's CAREER IMAGE marks similar to registered mark CREST CAREER IMAGES). Thus, the marks are similar in appearance and sound to the extent that Applicant's mark fully encompasses the registered mark.



Upon evaluating the mark  and the registered mark I-10 IPA, we find that the dominant feature of the registered mark is the term "I-10" and, similarly, "I-10" is a prominent feature of Applicant's mark. Because this term appears first in each mark, it is most likely to be impressed upon purchasers' memories. *Presto Products, Inc. v. Nice-Pak Products Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered"). There is no evidence of record

regarding the possible significance of “I-10” in relation to the identified goods. Applicant’s website indicates that “I-10” or “Interstate 10...starts right here in Jacksonville [FL] and runs all the way to the West Coast.”¹⁰ Neither Applicant nor the Examining Attorney suggests that “I-10” would have a different meaning or connotation in Applicant’s mark from that engendered by the registered mark, particularly as applied to goods that are, in-part, identical. The wording “I-10” and “IPA” in Applicant’s mark appears in much larger letters than the lettering comprising the other terms in the mark. As a result, the “I-10” and “IPA” portions of Applicant’s mark are visually more prominent than the remainder of the wording. This wording is identical to the registered mark.

Moreover, for source-identifying purposes, consumers will likely focus on the term “I-10” in the registered mark than the highly descriptive and disclaimed term “IPA.” Similarly, the “I-10” element in Applicant’s mark possesses more source-identifying significance in view of the fact that the additional literal portions thereof, namely, “GENUINE,” “QUALITY,” “WEST COAST,” “IPA,” and “INDIA PALE ALE,” are descriptive of the recited goods and thus disclaimed. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (“Regarding descriptive terms, this court has noted that the descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion”) quoting *In re Nat’l Data*. 224 USPQ at 752; *In re Dixie Rests. Inc.*, 105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702

¹⁰ Applicant’s April 5, 2018 Response to first Office Action at .pdf 13.

(TTAB 2001) (disclaimed matter is often “less significant in creating the mark’s commercial impression”).

Applicant’s mark comprises both words and a design. The words are normally accorded greater weight, in part because consumers are likely to remember and use the word(s) to request the goods. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1911 (Fed. Cir. 2012) (“the verbal portion of a word and design mark likely will be the dominant portion”); *In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987) (holding that “if one of the marks comprises both a word and a design, then the word is normally accorded greater weight because it would be used by purchasers to request the goods or services” and “because applicant’s mark shares with registrant’s mark that element responsible for creating its overall commercial impression, the marks are confusingly similar”). In this case, the design of a vintage wagon also serves as a carrier for the wording, which literally is emblazoned upon the doors, hood, fenders and grill of the automobile.

Consumers further are known to use shortened forms of names, and it is possible that Applicant and its goods are referred to as “I-10 IPA.” *Cf. In re Abcor Dev. Corp.*, 200 USPQ at 219 (Rich, J., concurring) (“the users of language have a universal habit of shortening full names – from haste or laziness or just economy of words”). In that regard, Applicant and at least one third party refer to its goods under the applied-for mark and related merchandise on its website and social media accounts as “I-10 IPA.” The following example, displayed below as Figure 2, is illustrative:¹¹

¹¹ Applicant’s April 5, 2018 Response to First Office Action at .pdf 10-15.

Figure 2.

The image shows a digital menu board with a dark background and white text. At the top, the word "BREWS" is displayed in large, white, sans-serif capital letters. Below this, there are two navigation links: "Taproom Draft List" (underlined) and "Taproom Package List". In the top right corner, it says "Updated on Apr 3, 3:23 PM EDT". The main title "TAPROOM DRAFT LIST" is centered in bold white text, with the subtitle "What's pouring in our taproom!" below it. The menu is divided into sections. The first section is titled "Current Taplist" with the subtitle "What's pouring in our taproom!". It lists three beers, each with a small image of the beer label, the name, style, ABV, description, and pricing for 5oz and 16oz drafts.

Beer Name	Style	ABV	Description	5oz Draft	16oz Draft
Jon Boat Coastal Ale	English Golden Ale	4.5%	An English golden ale cool-fermented to enhance its crisp and refreshing lager-like characteristics.	\$2.00	\$5.00
People's Pale Ale	American Pale Ale	5.5%	Our flagship beer, this is an American-style pale ale inspired by the hoppy beers of the West Coast.	\$2.00	\$5.00
I-10 IPA	West Coast-style IPA	6.75%	The West Coast comes to Jax with this extremely hoppy, true India Pale Ale.	\$3.00	\$6.00

Applicant argues that the facts of this case are similar to those presented in *In re Covalinski*, 113 USPQ2d 1166 (TTAB 2014), in which this tribunal found no



likelihood of confusion between the applied-for mark for various clothing items and the registered mark RACEGIRL for clothing items that encompassed in part the applicant's goods. In that decision, the Board found as follows:

Here, Applicant's design mark includes the very large, prominently displayed letters RR. The bodies of the Rs are filled with a checkerboard pattern resembling a racing flag. To each R an elongated horizontal "leg" of gradually increasing thickness is appended, each of which ends in a heart design. Inside the legs appear the rest of the letters (i.e., the letter strings "edneck" and "acegirl"), in a form in which the initial letters of each string are displayed in relatively tiny typeface and subsequent letters are displayed in increasing thickness. *Together, these graphic devices serve not only to draw attention to the RR letters apart from the wording, but also make the letters that form the "a-c-e" of the word "RACEGIRL" difficult to notice.*

In re Covalinski, 113 USPQ2d at 1168 (emphasis added). As a result, the Board held "that confusion is not likely because of the crucial difference between the marks." *Id.* at 1167-68.

However, the applied-for mark in *Covalinski* is distinguishable from Applicant's mark herein. As discussed above, the vintage wagon in Applicant's



mark clearly displays the wording emblazoned upon the sides,

hood and front of the car. The design does not draw the viewer's attention away from the wording, but rather draws attention to the wording by incorporating it into the design. A consumer viewing Applicant's mark cannot look at the design without noticing and reading the wording that covers large portions of the car. The largest lettering, "I-10" and "IPA" are particularly prominently displayed on the door and hood of the wagon. There is no separate design element, such as the "RR letters" in the *Covalinski* mark to either draw attention away from the wording or render the wording difficult to read. As a result, we find the facts of *Covalinski* to be distinguishable from those in the instant appeal.

In sum, while we recognize the obvious differences between them, we find the marks in their entireties to be more similar than dissimilar in appearance, sound and meaning and, overall, to convey similar commercial impressions. The fact that each mark is dominated by the same term "I-10" simply outweighs the points of dissimilarity. *Nat'l Data*, 224 USPQ at 751. Thus, this *du Pont* factor weighs in favor of finding a likelihood of confusion.

C. Likelihood of Confusion Summary

Considering all the evidence of record, including any evidence not specifically discussed herein, we find that the marks in their entireties are more similar than dissimilar and that the identified goods are in-part legally identical and will be encountered in common channels of trade at all price points by the same classes of consumers. We find therefore that Applicant's mark is likely to cause confusion with the mark in the cited registration when used in association with the identified goods.

IV. Conclusion

Decision: The refusal to register based upon a requirement under 37 C.F.R. § 2.37 for an amended description of the mark, is affirmed.

The refusal to register based on likelihood of confusion under Section 2(d) of the Trademark Act is affirmed.